## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION No. 5:10-CR-232-H

UNITED STATES OF AMERICA	)	
	)	
	)	
V.	)	
	)	ORDER
WILLIAM SCOTT MARTIN,	)	ORDER
Defendant.	, )	

Pending before the court is defendant's motion to withdraw his guilty plea to the sole count of the indictment - possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Defendant argues he is actually innocent of the offense because none of his prior convictions are for an offense "punishable by a term of imprisonment exceeding one year" under North Carolina law. Specifically, defendant contends that Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) requires the court to determine the maximum sentence he (as opposed to a hypothetical defendant) could have received in determining whether he has previously been convicted of an offense "punishable by a term of imprisonment exceeding one year." the time defendant pled guilty, Fourth Circuit precedent foreclosed this argument. See United States v. Simmons, 635 F.3d 140, 146-47 (4th Cir. 2011) (rejecting, on remand from the Supreme Court, argument that Carachuri overruled United States v. Harp, 406 F.3d 242 (2005), in which the Fourth Circuit held that the maximum aggravated sentence that could be imposed upon a defendant with the worst possible criminal history is used to determine whether a conviction is for a crime punishable by a prison term exceeding one year under North Carolina law), vacated & reh'g granted, No. 08-4475 (4th Cir. Mar. 18, 2011).

After defendant entered his guilty plea, the Fourth Circuit vacated the panel decision in <u>Simmons</u> and granted rehearing en banc. <u>Simmons</u>, No. 08-4475 (4th Cir. Mar. 18, 2011). On August 17, 2011, the Fourth Circuit issued an en banc decision overruling <u>Harp</u>. <u>United States v. Simmons</u>, No. 08-4475, slip. op. at 15-17 (4th Cir. Aug. 17, 2011).

To assist the court in its decisional process, the court hereby directs the government to inform the court, on or before August 31, 2011, of its position as to the impact on this case of the Fourth Circuit's recent en banc decision in <u>Simmons</u>. Defendant may provide a written response to the government's filing on or before September 7, 2011.

This 24th day of August 2011.

MALCOLM J. HOWARD

Senior United States District Judge

At Greenville, NC #31